STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORIANO JOHNSON,

Defendant-Appellant.

UNPUBLISHED
February 21, 2003

No. 237012
Wayne Circuit Court
LC No. 00-008988-01

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of three counts of first-degree felony-murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of life without parole for each of the felony-murder convictions, 285 months' to 50 years' imprisonment for the assault conviction, 285 months' to 50 years' imprisonment for the armed robbery conviction, 140 months' to 20 years' imprisonment for the home invasion conviction, and 38 months' to 5 years' imprisonment for the felon in possession of a firearm conviction, to be served consecutive to a two-year imprisonment term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant argues that he was denied the effective assistance of counsel because trial counsel failed to present an alibi defense. We disagree.

As this Court stated in *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001):

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a

heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Although defendant asserts that he was at work when the offenses were committed, the record reflects that defendant gave three separate statements to the police, each acknowledging his presence at the crime scene at the time of the offenses. There is no indication in the record that defendant ever mentioned a possible alibi defense before trial, or that he notified counsel of a potential alibi defense. It was not until after he was convicted that defendant submitted a "time sheet" purporting to show that he was at work when the offenses were committed. Even then, however, the time sheet defendant submitted was hand-written, did not identify an employer or bear any other company information, and was not signed by either defendant or an employer. Further, defendant never submitted an affidavit from the employer who he claims could have testified regarding his presence at work, or who could have verified the legitimacy and accuracy of the unsigned time sheet. Under the circumstances, we find that defendant failed to demonstrate a plausible alibi defense. See *People v Leonard*, 224 Mich App 569, 592-593; 569 NW2d 663 (1997). Thus, defendant has not shown that counsel was ineffective.

II

Next, defendant argues that the trial court abused its discretion when it admitted the child victim's statements to a patient care technician and a police officer under the excited utterance exception to the hearsay rule, MRE 803(2). We review the trial court's decision to admit the evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The excited utterance exception to the general rule prohibiting hearsay, MRE 803(2), provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> **(2) Excited Utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

In *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), the Court explained:

> The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the "sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19.

It is "the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule." *Smith, supra* at 551.

In this case, defendant does not dispute that the victim's statements related to a startling event. Rather, he argues that, because the statements were made approximately three weeks after the startling event, the victim was not still under the sway of excitement caused by the event when he made the statements, which defendant alleges were neither spontaneous nor trustworthy.

In *Smith*, *supra*, our Supreme Court stated:

> Though the time that passes between the event and the statement is an important factor to be considered in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. It is necessary to consider whether there was a plausible explanation for the delay. . . . [T]here is no express time limit for excited utterances. "Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum. The trial court's determination whether the declarant was still under the stress of the event is given wide discretion. [*Id*. at 551-552 (citations omitted).]

Here, the evidence demonstrated that there was a plausible explanation for the child's delay in making the statements. Apart from having witnessed his own mother and father shot to death in his presence, the child, who was only five-years old, also suffered a serious gunshot wound himself. He was hospitalized, underwent at least two surgeries, and was receiving medication for his pain during the weeks following the shooting. Further, the record indicates that the statements in question were made spontaneously, without prompting by others. Affording wide discretion to the trial court's decision, as we must, *Smith*, *supra*, we conclude that the trial court did not abuse its discretion in determining that the circumstances did not suggest a capacity to fabricate and that the statements were made while the child was still under the emotional sway of excitement caused by the unquestionably startling event.

III

Defendant next argues that the trial court abused its discretion by admitting photographs of the victims. Photographs are admissible if they are substantially necessary or instructive to show material facts or conditions. *People v Falkner*, 389 Mich 682, 685; 209 NW2d 193 (1973). Photographs are not inadmissible merely because they may be gruesome and shocking. However, the trial court should exclude photos that could lead the jury to abdicate its truth-finding function and convict on passion alone. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). If a photograph is otherwise admissible for a proper purpose, it is not rendered inadmissible merely because it is gruesome or shocking. *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997).

Defendant asserts that the photographs were not relevant because he did not dispute that the victims were shot. However, defendant's plea of not guilty placed all of the elements of the offense into issue. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). We agree with the trial court that the photographs were relevant to show intent, given that defendant was charged with three counts of first-degree felony-murder and assault with intent to commit murder. MCL 750.316; MCL 750.83.

Defendant also argues that the photographs were inadmissible because their probative value was substantially outweighed by their prejudicial effect. MRE 403. However, after reviewing the photographs, we disagree. Therefore, the admission of the photographs was not an abuse of discretion.

IV

Next, defendant argues that he was denied a fair trial because of misconduct by the prosecutor. Because defendant did not object to any of the alleged instances of misconduct, however, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Prosecutorial remarks are reviewed on a case-by-case basis after examining the context in which they were made. *Schutte*, *supra* at 721. Our review of the challenged remarks in this case reveals no plain error. A prosecutor is permitted to act zealously as long as she does so for legitimate reasons, *People v Pfaffle*, 246 Mich App 282, 293; 632 NW2d 162 (2001), and it is not improper for a prosecutor to use "hard language" when it is supported by evidence, *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Further, the prosecutor is permitted to comment on the testimony in a case and to argue that, upon the facts presented, a witness is not worthy of belief or is lying. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999); *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). In this case, defendant has not demonstrated that the prosecutor's comments exceeded the bounds of propriety.

V

Finally, defendant argues that the trial court improperly accepted his waiver of counsel at sentencing because the waiver was not unequivocal or intelligently, knowingly and voluntarily made. Again, we disagree.

The record reveals that the trial court substantially complied with the waiver of counsel requirements set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D). *People v Adkins (After Remand)*, 452 Mich 702, 720-723; 551 NW2d 108 (1996). Contrary to what defendant argues, the record does not disclose that defendant asserted that he was illiterate, or that there was a "media frenzy" in the courtroom. In fact, the record reflects that defendant expressly stated that he was literate, that he understood English, and that he understood the procedures that were taking place. The record also reveals that the trial court was careful to insure that defendant's decision to waive counsel was both informed and voluntary. Finally, we reject defendant's claim that his waiver should not have been accepted because he was likely to "unduly disrupt" the proceedings. Notably, the record reflects that the sentencing proceeded without interruption. Thus, we find no merit to this issue.

Affirmed.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter